STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 22, 2007
v	No. 265907 Wayne Circuit Court
KEVIN DEWAYNE ARNOLD, Defendant-Appellant.	LC No. 05-004763-01

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

After a jury trial, defendant Kevin Dewayne Arnold was convicted of three counts of assault with a dangerous weapon (felonious assault), MCL 750.82, one count of intentional discharge of a firearm at a dwelling or an occupied structure, MCL 750.234b, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent terms of 28 months' to four years' imprisonment for each felonious assault conviction and for the discharge of a firearm conviction, and a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

I. Facts

Defendant resides with his wife, his children, his brother-in-law, and his brother-in-law's children at their home in Detroit. Celestine Burkes lives next door. Burkes' brother, Paul Clay, does not live with her, but Burkes baby-sits his children at her home. At the time of the events in question, Clay was engaged to Chastity Cross, defendant's niece. Clay and defendant had known each other for some time. Clay described defendant as a friend, but he and defendant's brother-in-law (who is also Cross's father) had an altercation approximately one week before the events in question.

According to the prosecution's witnesses, on the evening of April 25, 2005, Burkes was baby-sitting four of Clay's minor children. At about 9:30 p.m., Clay and Cross arrived at Burkes' house to pick up his children. When they arrived, defendant was standing in his driveway drinking and yelling in the direction of Burkes' house. Clay approached defendant, who began yelling that others thought that defendant was "a joke" and warned that he would "kill me a bitch today." When Clay asked if he was "all right," defendant responded that he was "about to f--- me somebody up." Clay did not respond.

Clay and Cross entered Burkes' house. Clay continued to watch defendant from a window of Burkes' house. Defendant loudly threatened to shoot Burkes' house. He then opened the trunk of a white Dodge Intrepid parked in his driveway. The trunk contained two weapons, a gray semi-automatic handgun and an AK-47 rifle. Defendant repeatedly opened and closed the trunk, grabbed the weapons inside the trunk and then put them back, and walked around the Intrepid, yelling profanities at Burkes' house. At some point, defendant took the handgun from the trunk, waved it and aimed it at Burkes' house, and threatened, "I'm going to kill that m----- f-----." He ran toward Burkes' house, pointed the handgun at an upstairs story of the house, and fired twice. Defendant then walked back to the Intrepid, took a drink from a bottle of liquor, opened the trunk, and placed the handgun inside. Defendant also retrieved the AK-47 from the trunk and gave it to an unidentified individual seated on the porch of his home. As these events occurred, Clay called the police to report the shooting.

Soon after defendant fired the handgun, Bruce Perfect stopped his truck in Burkes' driveway. Clay and Perfect were friends, and Perfect had planned to stop by Burkes' home to visit Clay and his children. When Perfect arrived, Clay walked outside and approached the truck to talk. Perfect did not leave the truck at this time.

Shortly thereafter, the police arrived. When they arrived, defendant yelled "y'all m----- f----- can't get me" and went inside his house. After Clay informed the officers that defendant had fired two shots at the house, the officers approached defendant's house to speak with him. Defendant's son answered the door and refused to let the officers enter. Clay also heard defendant argue with the officers and tell them to get away from his house. The officers discontinued the interview with defendant and told Clay that there was "nothing they could do." Before leaving, they told Clay to call if defendant again came outside.

Perfect sat in his truck as Clay reentered Burkes' home and prepared his children to leave. Clay then went back outside. As he approached Perfect's truck, defendant came back outside and ran toward Perfect and Clay, holding a handgun. When he was approximately 25 feet away from Clay and Perfect, defendant pointed the handgun at the men, stating, "You m----- f------ thought that the police was [sic] going to get me, they can't get me, I'm a lion, I'm a god, you thought that was [sic] going to take my guns."

As Clay ducked behind his vehicle, which was parked in front of Perfect's truck, defendant retrieved the AK-47 rifle. Clay then ran across the street and hid behind a large tree. Defendant, holding the rifle, advanced toward Perfect, who was still in the truck. Perfect backed his truck approximately 20 feet. Then, defendant pointed the rifle at him and yelled, "I see you little fat h-----, I'll shoot you're [sic] ass." Perfect quickly exited his vehicle and ran to the tree where Clay was hiding. After reaching the tree, Perfect called "911" and informed the operator that defendant was threatening him with an "assault rifle." Defendant then returned to his house and set the AK-47 rifle down on his porch.

At this point, Shanise Tramble was walking down the street toward Burkes' house. She planned to visit Burkes' daughter, a close friend. When Tramble passed defendant's house, he pointed a handgun at her and asked, "Who that?" Defendant then stated, "Who the f--- that . . . I'll kill you, bitch." Tramble was shaken by the encounter but managed to identify herself. Defendant responded, "You little bitch, you almost got shot, get the f--- away from here, I'll kill you." Tramble ran inside Burkes' house.

Soon thereafter, the police arrived. When defendant saw the first squad car approach, he ran inside his house and shut the door. After the officers arrived, Clay and Perfect informed them of defendant's actions. The officers surrounded defendant's home and told him to come outside. Defendant opened his door and stood in the entryway, yelling at the officers when they approached. After a short struggle, the police handcuffed and arrested defendant.

II. Sufficiency of the Evidence/Great Weight of the Evidence

Defendant argues that the prosecution presented insufficient evidence to support his convictions. He also argues that he is entitled to a new trial because his convictions are against the great weight of the evidence. We disagree.

A. Standards of Review

We review de novo claims of insufficient evidence in a criminal trial. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

Because defendant failed to move for a new trial, and because this Court previously denied defendant's motion to remand this case to the trial court to permit him to file and argue a motion for a new trial, this issue is not preserved. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). We review an unpreserved claim that a conviction is contrary to the great weight of the evidence for plain error affecting defendant's substantial rights. *Id.* Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

To determine whether a verdict is contrary to the great weight of the evidence, we review the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled on other grounds *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). A verdict is contrary to the great weight of the evidence if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, *supra* at 218-219.

B. Felonious Assault

"The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). To commit an assault, one must show "either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995), quoting *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Carines*, *supra* at 757, quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

In this case, the prosecution presented sufficient evidence to permit a reasonable juror to conclude that defendant assaulted Clay, Perfect, and Tramble with a dangerous weapon. First, defendant pointed a firearm at each victim. A reasonable juror could conclude that these actions placed the victims in reasonable apprehension of being shot. Second, each victim testified that defendant held a gun during the assault. A gun is considered a dangerous weapon for purposes of the felonious assault statute. MCL 750.82(1); *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998).

Finally, a reasonable juror could conclude that defendant either intended to hurt each victim or intended to place each victim in reasonable apprehension of an immediate battery. Defendant was angry regarding a prior altercation between Clay and his brother-in-law and threatened Clay when he arrived at Burkes' home. When defendant assaulted Clay and Perfect, he pointed a handgun at the men and threatened to kill them. Shortly thereafter, he again assaulted Perfect by pointing a rifle at him and threatening to shoot him. Later, when Tramble walked near defendant's home, he pointed a handgun at her and threatened to kill her if she didn't "get . . . away from here." After considering evidence that defendant repeatedly threatened to shoot or to kill the victims, a reasonable juror could conclude that defendant intended to either injure them or to place them in reasonable fear and apprehension of an immediate battery. Accordingly, the prosecution presented sufficient evidence to establish that defendant committed felonious assault against Clay, Perfect, and Tramble.

Similarly, we conclude that defendant's convictions for felonious assault are not against the great weight of the evidence. Although defendant presented witnesses who testified that he did not confront Clay or Perfect with a weapon, that they did not hear shots fired that evening, and that defendant was arrested because he was intoxicated, the question whether the sequence of events presented by his witnesses should be believed instead of the testimony presented by the victims is one of credibility. "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *Avant, supra* at 506. Similarly, although defendant argues that the victims' statements at trial were inconsistent and that they were not credible witnesses, we will not question the jury's assessments regarding the credibility of witnesses or the weight ascribed to their testimony. See *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial" based on the weight of the evidence. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001), quoting *Lemmon, supra* at 647. Defendant failed to show that the evidence preponderates so heavily against his convictions for felonious assault that it would be a miscarriage of justice to allow the verdict to stand. See *Musser, supra* at 218-219. Accordingly, the trial court did not plainly err when it upheld defendant's convictions, and he is not entitled to a new trial.

C. Discharge of a Firearm at a Dwelling or an Occupied Structure

The prosecution presented sufficient evidence to support defendant's conviction for discharge of a firearm at a dwelling or an occupied structure. A defendant is guilty of this offense if he "intentionally discharges a firearm at a facility that he . . . knows or has reason to believe is a dwelling or an occupied structure . . . ." MCL 750.234b(1). In this case, Clay's testimony was sufficient to establish that defendant committed this offense. Defendant was Burkes' next-door neighbor and was outside when Clay entered her home. Clay watched from inside Burkes' house as defendant removed a handgun from the trunk of a car, ran toward the

house pointing the handgun at the upper story of the house, and fired two shots. At the time, at least seven individuals, including several minor children, were inside the house. Accordingly, a reasonable juror could conclude that defendant shot at Burkes' house, although he knew or reasonably should have known that the Burkes' house was a dwelling and was occupied at the time of the shooting.

Similarly, defendant's conviction for this offense is not against the great weight of the evidence. Defendant argues that Clay testified that defendant shot at Burkes' house, but stated on cross-examination that he shot in the air in the direction of Burkes' house. However, the prosecution was not required to show that defendant actually struck the house when he fired the handgun at Burkes' residence. See *People v Wilson*, 230 Mich App 590, 592-593; 585 NW2d 24 (1998) (holding that evidence that the defendant was shooting toward or in the direction of an occupied house was sufficient to support the defendant's conviction for intentionally discharging a firearm at a dwelling or occupied structure). Further, when Clay acknowledged, in response to defense counsel's question, that he "guess[ed] you could say that" the shots were fired in the air, he qualified his statement by adding, "But it was fired in the direction of the house, at the top of the house." This is consistent with Clay's earlier testimony that defendant shot at the upper part of the house. Defendant failed to show that the evidence preponderates so heavily against his conviction for intentionally discharging a firearm at a dwelling or an occupied structure that it would be a miscarriage of justice to allow the verdict to stand. *Musser*, *supra* at 218-219. Accordingly, the trial court did not plainly err when it upheld defendant's conviction, and he is not entitled to a new trial.

D. Felony-Firearm

Finally, the prosecution presented sufficient evidence to establish defendant's felony-firearm conviction. A defendant commits felony-firearm when he "carries or has in his . . . possession a firearm when he . . . commits or attempts to commit a felony . . . ." MCL 750.227b. Several witnesses testified that defendant carried and possessed a gun at the time of the events in question. Because the prosecution presented sufficient evidence to find defendant guilty of felonious assault and discharge of a firearm at a dwelling or an occupied structure, either offense may serve as the underlying felony for the felony-firearm conviction. *People v Guiles*, 199 Mich App 54, 58-59; 500 NW2d 757 (1993). Similarly, defendant failed to show that the evidence preponderates so heavily against his felony-firearm conviction that it would be a miscarriage of justice to allow the verdict to stand, and the trial court did not plainly err when it upheld defendant's conviction. *Musser*, *supra* at 218-219. He is not entitled to a new trial on this charge.

III. Motion for Mistrial

Defendant argues that the trial court erroneously denied his motion for a mistrial. We disagree. We review the trial court's denial of defendant's motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Defendant argues that the trial court should have granted his motion for a mistrial because Perfect made an unsolicited comment that defendant "had just got out of prison for murder" when testifying at trial. "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* (citations

omitted). However, an unresponsive, volunteered answer that injects improper evidence in a trial is generally not grounds for a mistrial, especially if the prosecutor did not know in advance that the witness would give the unresponsive testimony or did not otherwise encourage the witness to give the testimony. See *People v Griffin*, 235 Mich App 27, 36-37; 597 NW2d 176 (1999). The determination whether to grant a mistrial because an unresponsive answer has been given is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lumsden*, 168 Mich App 286, 298-299; 423 NW2d 645 (1988).

Perfect's comment was unsolicited, and defendant does not argue, nor does the trial court record indicate, that the prosecutor knew that Perfect planned to make this comment or attempted to elicit this testimony. The line of questioning that the prosecutor followed before Perfect made the unsolicited comment, and the question to which Perfect gave the unsolicited response, were proper and did not appear to be calculated to elicit improper testimony. Defendant's counsel immediately objected and the trial court told the jury to ignore Perfect's statement. The prosecutor did not mention Perfect's comment at any point during the trial. Further, the trial court administered an additional cautionary instruction to the jury the following day. Jurors are presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Although the unsolicited statement might be construed as an irregularity, it was not so egregious that it denied defendant a fair trial. The trial court did not abuse its discretion when it denied defendant's motion for a mistrial.

IV. Right to Fair and Impartial Trial

Defendant argues that, in several respects, the trial court denied his constitutional right to a fair and impartial trial. Specifically, defendant contends that the trial court failed to remain impartial when making its evidentiary rulings, repeatedly disparaged defense counsel and defense witnesses' testimony, exhibited partiality toward the prosecution and the prosecution's witnesses, permitted the prosecutor to make arguments unsupported by the evidence in her closing argument, and gave an improper missing witness instruction. Defendant's arguments are without merit.

A. General Law and Standard of Review

"The Sixth Amendment of the United States Constitution and article 1, § 20 of the Michigan Constitution guarantee a defendant the right to a fair and impartial trial." *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006).

> Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." [*Id.* at 307-308, quoting *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988) (internal citations omitted".]

Defendant failed to object to the allegations of impartiality that he raises on appeal. Accordingly, he does not preserve this issue for our review. *Conley*, *supra* at 305. Therefore, we review this issue for plain error affecting defendant's substantial rights. *Id.* See also *Carines*, *supra* at 764.

B. Evidentiary Rulings

Defendant first argues that the trial court denied him a fair and impartial trial when it limited his cross-examination of the prosecution's witnesses regarding their potential biases or prejudices and otherwise exhibited partiality in its evidentiary rulings and comments. We disagree.

First, defendant argues that the trial court improperly limited his cross-examination regarding (1) Clay's relationship with Tramble, (2) Perfect's relationship with Clay, and (3) whether Clay had children with Cross. However, the trial court properly limited defendant's cross-examination of these witnesses regarding their potential biases or prejudices. Generally, a trial court has broad discretion to limit cross-examination regarding matters of marginal relevance to the charges. See *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Although defendant correctly notes that the prosecution's case rested on the victims' testimony, his claim that further testimony from either Clay, Perfect or Cross would have established that each witness was biased or prejudiced against defendant is speculative. Further, the trial court may have determined that further testimony would have been cumulative in light of defendant's extensive cross-examination of each witness. Accordingly, the trial court did not abuse its discretion when it limited defendant's cross-examination of these witnesses.

Next, defendant argues that the trial court permitted the prosecution to elicit improper testimony from Clay during direct examination, specifically, Clay's testimony describing defendant's statements to the police officers. Although defendant argues that these statements are inadmissible hearsay, they are not. Clay testified regarding statements made by a party that were offered against that party by a party opponent; these statements are not hearsay and are admissible. MRE 801(d)(2)(A). Thus, the trial court did not err when it permitted the prosecution to examine Clay regarding defendant's statements.

Further, defendant contends that the trial court limited his examination regarding whether Tramble was in high school and impermissibly commented about her testimony by instructing defense counsel to "move on." Moreover, defendant challenges the trial court's instruction to defense counsel during the cross-examination of Tramble. The trial court may limit the scope of cross-examination to prevent inquiry into irrelevant or collateral matters bearing only on general credibility. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence regarding whether Tramble was in high school is not relevant to establish or disprove the charges against defendant, and is only marginally relevant to matters of Tramble's general credibility. Thus, the trial court properly limited defendant's cross-examination of Tramble.

Finally, defendant argues that the trial court erred when it told defense witness Lacarlos Dubose to "shut up" when he was testifying. The trial court's comment did not deprive

defendant of a fair and impartial trial. The trial court previously instructed Dubose at several points during his testimony not to speculate regarding what another witness was thinking at the time of the incident. Further, partiality is not established by a trial court's expressions of impatience, dissatisfaction, annoyance, or anger that are within the bounds of what imperfect men and women sometimes display. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996), quoting *Liteky v United States*, 510 US 540, 550; 114 S Ct 1147; 127 L Ed 2d 474 (1994). Although the trial court's directive to Dubose might be a break in usual trial decorum, the comment did not deny defendant a fair trial. Defendant's argument is without merit.

C. Closing Argument

Next, defendant argues that the trial court denied him a fair and impartial trial when it allowed the prosecution, during closing arguments, to refer to facts that were not introduced in evidence. We disagree.

Defendant specifically challenges the following statement made by the prosecution to explain why it did not have the weapons used in the charged offenses:

> Well there wasn't a gun in the car at that time. It had been taken into the house, the house the police never entered. They didn't enter [defendant's residence]. They didn't get a search warrant. They didn't search the house. That's why there aren't guns.

Based on the evidence presented at trial, the prosecution presented a reasonable explanation why no weapons were recovered. A prosecutor is "free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Both Clay and Perfect testified that defendant placed the weapons in his house and that the officers did not search or enter defendant's residence either before or after his arrest. Because the prosecutor's inferences were reasonable, the trial court was not required to limit her closing argument. Regardless, a timely curative instruction could have cured any alleged prejudice, and therefore, reversal of the unpreserved claim of prosecutorial misconduct is not warranted. See *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

D. Jury Instructions

Finally, defendant argues that the trial court denied him a fair and impartial trial by giving an improper missing witness instruction. We disagree. "Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred." *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003) (citations omitted). "It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law." *Id.* The standard missing witness instruction provides:

> *[State name of witness]* is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case. [CJI2d 5.12.]

Detroit Police Officers Joubert and Brown, who apparently participated in defendant's arrest, failed to testify at defendant's trial. The trial court agreed to give a missing witness instruction to the jury. The trial court instructed the jury as follows:

> There was a witness of the prosecutor. I mentioned an Officer Joubert or Brown, police officer, who was involved with the arrest of the defendant is a missing witness whose appearance was the responsibility of the prosecution. You may infer that the witness's testimony would have been unfavorable to the prosecution's case, but that's for you to decide.

Defendant argues that the trial court was required to give a separate missing witness instruction regarding the absence of each officer. Defendant also argues that the trial court's final statement, "but that's for you to decide," was unnecessarily repetitive, and that the statement, "police officer, who was involved in the arrest of defendant" was not supported by the evidence. However, the missing witness instruction given by the trial court properly informed the jury that it could infer, based on the prosecutor's failure to produce the officers to testify regarding defendant's arrest, that the potential testimony would have been damaging to the prosecution's case. Read as a whole, the instruction properly informed the jury about the applicable law. See *McKinney*, *supra* at 162. Although the trial court's statement, "but that's for you to decide," may have been repetitive, it properly emphasized to the jury that it had the discretion to infer that the officers' testimony would have been unfavorable to the prosecution. Further, defendant fails to explain why he believes that the trial court's statement noting the officers' involvement in his arrest prejudiced him. Thus, the trial court's missing witness instruction did not deny defendant a fair and impartial trial.

V. Cumulative Error

Finally, defendant argues that the cumulative effect of the errors at trial denied him a fair trial. Because no cognizable errors meriting relief have been identified, reversal under the cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ Helene N. White